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Major League Baseball's Answer to Salary Disputes and the Strike

Final Offer Arbitration: A Negotiation Tool Facilitating Adversary Agreement

- Brien M. Wassner*

Throughout the history of professional sports, labor disputes have been a major source of contention causing disorder and strife within every professional sports league.¹ Arbitration² is the current form of dispute resolution, designed and implemented by the professional sports leagues' "collective bargaining agreements,"³ to cope with increasing labor conflicts in the professional sports industry.⁴ A primary reason for the development of the collective bargaining agreement and arbitration to resolve labor conflicts was the escalation of strikes and lockouts arising out of labor disputes.⁵ The result of such unresolved labor conflicts is the loss of millions of dollars by both the owners and the players of professional baseball teams.⁶ Major League Baseball (hereinafter MLB), for example, has encountered more labor-management disputes than any other professional sports league.⁷ The extraordinary amount of labor disputes in MLB can be attributed to MLB's collective bargaining agreement, years of near total owner control of labor relations, and the introduction of free agency.⁸ Arbitration provides an essential and indispensable means by which professional sports leagues can settle labor disputes expeditiously and economically without either side resorting to strikes or lockouts.⁹

In the early 1960s, arbitration entered the professional sports arena as the preferred method for resolving labor disputes.¹⁰ Since its introduction into professional sports, arbitration has been incorporated into almost all collective bargaining agreements. Furthermore, courts have regarded arbitration as the proper forum for

resolving labor disputes arising under the collective bargaining agreement.¹¹ Consequently, arbitration is the primary forum for resolving disputes between the players and the owners concerning salaries.¹² The major professional sports leagues in the United States all employ arbitration to resolve salary disputes; however, MLB has initiated a unique, and possibly superior, form of arbitration called "final offer arbitration" (hereinafter FOA).¹³

Initially, this paper will briefly consider arbitration in general and then discuss the evolution of FOA and its implementation into MLB salary disputes. This paper will thereafter analyze the praises and criticisms of FOA, and establish that FOA is a superior mechanism for resolving salary disputes in professional sports because the FOA system is designed to facilitate negotiation and settlement rather than to resolve the dispute subsequent to adversarial hearings.

I. Arbitration: An Alternative to Litigation

Arbitration is a form of adjudication where the parties agree on a neutral decision maker who is neither a judge nor an official from an administrative agency. This decision-maker then renders a binding judgment on their dispute.¹⁴ No single definitive definition can perfectly describe the various forms of arbitration, as there are many variants

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to the process.¹⁵ Generally, arbitration is an alternative to litigation, where the parties, under contract or otherwise, agree to arbitrate their dispute through 'non-judicial means.'¹⁶ With few exceptions, arbitration hearings are not open to the public.¹⁷ When parties enter into an arbitration agreement, they understand that the decision is binding and cannot be appealed.¹⁸

Prior to an arbitration proceeding, parties enter into an agreement to arbitrate specific sources of contention. At this time, parties have significant latitude to design the procedures, substantive standards, and specifications of the arbitration.¹⁹ The parties may also jointly select the neutral decision-maker.²⁰ As a result, numerous new systems of arbitration have developed.²¹ These systems are tailored by the parties to meet their own specific interests, and often more closely resemble "mixed processes" rather than arbitration.²² Mixed processes combine elements of the primary process, including negotiation, mediation, fact finding, or adjudication. Primary processes include court-annexed arbitration, summary jury trials, and mediation-arbitration. Each of these processes, whether court annexed or privately conjured, 'borrows' components from the various alternative dispute resolution processes and applies them accordingly, in a more tailored fashion, to the specific needs of the dispute.

The two prevalent types of arbitration employed today are "interest arbitration"²³ and "grievance arbitration."²⁴ Interest arbitration sets the terms of a contract arising under a collective bargaining agreement.²⁵ FOA is a type of interest arbitration, and in MLB, replaces the strike or lockout with the risk that a neutral third party will determine the settlement.²⁶ This risk can be a difference of millions of dollars. For example, Player X submits his estimate of what he believes he deserves as a salary, say \$6 million per year, and the Owner submits his number of \$1.6 million per year. The risk lies in the fact that the arbitrator can only choose the player's number or the owner's number and cannot negotiate a middle number. Both parties stand to lose huge amounts of money as oftentimes these are multiple year contracts.

Grievance arbitration,²⁷ on the other hand, interprets the terms of an agreement rather than setting those terms.²⁸ Grievance arbitration is most analogous to labor arbitration in the private sector, excluding salary arbitration. However, in grievance arbitration, management seldom assigns the arbitrator the power to set the terms of an agreement.²⁹ Instead, the arbitrator interprets the terms of the agreement.

Conversely, in interest arbitration, the arbitrator is given the power to set the agreement terms to avoid strikes while resolving labor disputes over contract terms.³⁰

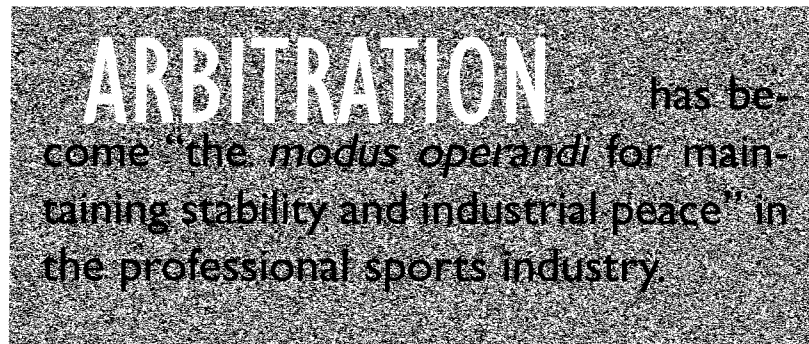
Arbitration is used primarily in commercial and labor disputes via collective bargaining agreements in the areas of injury, salary, discipline, and general disputes arising out of the agreement terms.³¹ If the dispute is not one in the labor context, it is generally considered one of commercial origin.³² In professional sports, both commercial and labor arbitration are customary. Collective bargaining agreements in professional sports provide for arbitration to settle grievances, especially those concerning salary disputes.³³

Historically, courts defer to the arbitrator's ruling in the labor context unless it is clear that the parties specifically intended that the dispute not be arbitrated.³⁴

Prior to 1984, courts held a strong presumption against arbitration in the

commercial context primarily because of state statutory limitations on commercial arbitration.³⁵ However, in 1984, the Supreme Court ruled that the Federal Arbitration Act governs both federal and state courts, "superceding conflicting state statutes."³⁶ The Supreme Court mandated that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability..."³⁷ A "strong federal policy favoring arbitration" over litigation remains in both the labor or commercial context when contractual provisions provide for "arbitrability" of claims.³⁸

As a result, arbitration has become "the *modus operandi* for maintaining stability and industrial peace"³⁹ in the professional sports industry. When an arbitrator rules on a dispute arising out of a collective bargaining agreement or implicating the National Labor Relations Act,⁴⁰ courts will almost always honor the decision.⁴¹ If the four criteria justifying arbitration are met, a court will not overturn an arbitrator's ruling. These criteria are: (1) the grievance proceeding must be fair; (2) the parties must have agreed to be bound by the arbitration decision; (3) the arbitrator's decision must be consistent with the NLRA and in no way contravene its purposes and policies; and (4) the issues presented by the alleged unfair labor practice must have been part of the case before the arbitrator.⁴² Arbitration in professional sports has deterred strikes and lockouts by providing a viable, expedient and efficient resolution of disputes between players and clubs. Following the Supreme Court's support of the process, arbitration became the



preferred method resolving labor disputes in professional sports.

II. The Evolution of Final Offer Arbitration in Major League Baseball

FOA, as used by MLB, exemplifies how parties can construct a unique process geared towards their specific needs.⁴³ Baseball's salary arbitration process surfaced, in part, as a response to the unprecedented amount of labor disputes within the MLB and the resulting turmoil. The extraordinary amounts of disputes in MLB surfaced, primarily, in response to the collective bargaining agreements, and predominantly concerned players' salaries. Baseball arbitration can be traced back to procedures used in negotiating labor management disputes in unionized sectors.⁴⁴ The process of FOA was originally introduced as a mechanism for resolving labor disputes in the 1940s to circumvent the Taft-Hartley Act's⁴⁵ national emergency dispute procedures.⁴⁶

A. Before Arbitration Was a Part of Major League Baseball

The excessive number of labor disputes in MLB, due to the extreme power maintained by the owners over the players' careers for most of this century, necessitated a revamping of the leagues' labor dispute resolution practices. Prior to the current arbitration method employed by MLB, the owners used a 'board of arbitration' to deal with league policy concerns.⁴⁷ This board, however, was not impartial because it was an "instrument of baseball's management."⁴⁸ MLB's owners had total power in determining what salary a player would get once he signed with the team.⁴⁹ The advent of the "reserve clause" was a reason for the owners' total power, and was further augmented by MLB's antitrust exemption.⁵⁰

The reserve clause gave owners "the option of renewing a player's contract *ad infinitum* at a salary determined by the owner."⁵¹ The reserve clause was implemented in every baseball player's contract from the 1880s until the 1970s⁵² when it was finally discarded after years of litigation, arbitration and collective bargaining.⁵³ Prior to the nullification of the reserve clause, players had only two options if they did not agree with their contract.⁵⁴ They could either continue to play for their current owner or they could retire from the game altogether.⁵⁵

The reserve clause was only the beginning of the owners' monopolistic rule of MLB.⁵⁶ In *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*,⁵⁷ the plaintiff, an opposing league to MLB, challenged MLB's reserve clause. Plaintiff alleged that MLB "conspired to monopolize the baseball business"⁵⁸ because players could

not get out of their contracts, and thus, could not sign with their league.⁵⁹ Finding in favor of the defendant, the Court effectively exempted MLB from antitrust laws.⁶⁰ The Court stated, "that which in its consummation is not commerce does not become commerce among the States" simply because the teams cross state lines for their exhibitions and induce their players to do so.⁶¹ Therefore, the charges "against the defendants were not an interference with commerce among the States."⁶² Consequently, MLB became the only professional sports league in the United States to enjoy antitrust exemption.⁶³ This ruling laid the foundation for the future chaos erupting within MLB concerning player salary disputes and the eventual strikes and lockouts faced by the league.⁶⁴

Two subsequent cases heard by the Supreme Court regarding MLB's antitrust exemption reinforced that exemption. In *Toolson v. New York Yankees, Inc.*,⁶⁵ the Court held that the decision to overturn MLB's antitrust exemption rests in Congress' dominion.⁶⁶ In that case, plaintiff alleged that MLB team owners violated antitrust laws.⁶⁷ Toolson played for the New York Yankees.⁶⁸ He refused to report to spring training, and subsequently, other league owners would not sign him to their roster.⁶⁹ Toolson claimed that MLB attempted to monopolize professional baseball and maintained unjust restraints on players by way of the reserve clause.⁷⁰ In a *per curiam* decision, the court stated that "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws."⁷¹

In *Flood v. Kuhn*,⁷² the Supreme Court once again upheld MLB's antitrust exemption. Flood challenged MLB's anti-trust exemption after he was traded to the Philadelphia Phillies by the St. Louis Cardinals.⁷³ He refused to play with the Phillies that season, planning to sign with another team following the end of the season.⁷⁴ The Court stated that although professional baseball is indeed a business involved in interstate commerce, it is in a "very distinct sense, an exception and an anomaly." Therefore, MLB may enjoy an exemption from antitrust laws. However, other professional sports are not permitted to enjoy this same exemption.⁷⁵ The Court's decision "rests on recognition and an acceptance of baseball's unique characteristics and needs" and the lack of action by Congress to overturn the exemption.⁷⁶

This antitrust exemption has been a major source of contention in MLB, but neither Congress nor the Supreme Court has overturned the rulings of *Federal Baseball Club of Baltimore, Inc.*, *Toolson* or *Flood*.⁷⁷ Consequently, "litigation has proven to be an ineffective forum for players in their attempt to equalize their bargaining position with the owners."⁷⁸ The players had to find alternative methods to achieve their goals.⁷⁹ Unionization, negotiation and collective bargaining became the means by which players leveled the bargaining field.⁸⁰ In search of means to overcome MLB's antitrust exemption, the players' union appointed Marvin Miller as president of the Major League Players' Association.⁸¹

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Marvin Miller then sought and acquired recognition of the players' union's bargaining status by the National Labor Relations Board in 1969.⁸² Finally, the players found equal bargaining power and a means to effectuate change in MLB's labor system.⁸³ The players achieved equal bargaining power through labor laws when the antitrust laws failed them.⁸⁴

B. Enter Arbitration and Collective Bargaining

In 1972, the players organized a strike which finally caught the owners' attention.⁸⁵ As a result, in 1973, the players incorporated a salary arbitration clause in the 1973 Collective Bargaining Agreement. This clause stated that if players and owners could not reach an agreement concerning the player's salary, an outside arbitrator would resolve the dispute.⁸⁶ In 1975, the reserve clause was virtually nullified during an arbitration hearing with Andy Messersmith, then of the Los Angeles Dodgers.

Messersmith challenged MLB's reserve clause by way of grievance arbitration.⁸⁷ Messersmith played out his renewal contract with the Los Angeles Dodgers. Following the end of the season, Messersmith sought to sign with another team in the league.⁸⁸ Every team in the league refused to bid for his services because they assumed that he 'belonged to the Dodgers.'⁸⁹ In reaction, Messersmith invoked the grievance arbitration process agreed to in the collective bargaining agreement, alleging that the renewal clause only renewed his services for one additional year.⁹⁰ The owners countered that if a team renews a player's contract under the same terms as the original contract, the original contract's renewal terms are incorporated in the renewed contract.⁹¹ Thus, the owners claimed that the contract conferred perpetual rights of renewal to the team.⁹² The arbitrator ruled for Messersmith, noting that the renewal clause only gave the team the right to one additional year of service.⁹³ Consequently, the ruling permitted any player who plays out his renewal term to become a free agent.⁹⁴ The decision set the stage for player free agency in MLB.⁹⁵ However, the owners did not take this decision lightly and appealed the judgment to the courts.⁹⁶ A federal district court, supported by a federal appeals court, upheld the decision, finding no wrongdoing on the arbitrator's behalf.⁹⁷

Following the *Messersmith-McNally* decision and the establishment of free agency, labor dispute disorder in MLB became the norm.⁹⁸ Salaries skyrocketed from an average of \$51,501 in 1975 to \$76,066 in 1976

and \$371,157 in 1985.⁹⁹ Player strikes and/or lockouts became a regular practice over the next couple of years.¹⁰⁰ The 1981 MLB season saw the first midseason strike, the third in baseball's history, and cost the players, the owners, the cities, and related businesses extraordinary amounts of money.¹⁰¹ However, the players finally became a force to be reckoned with and collective bargaining became the tool by which baseball's future would be shaped.¹⁰²

The launch of free agency and salary arbitration resulted in new tensions between the players and owners. Players attained substantial bargaining power and a veritable means for resolving salary disputes.¹⁰³ Owners resented the increase in players' salaries, blaming it on the implementation of salary arbitration.¹⁰⁴ Consequently, the owners continuously undertake to abolish the clause, while the players persistently refuse to negotiate it away.¹⁰⁵ The 1990 Basic Agreement was implemented by the league in 1990 after a thirty-two day spring training lockout that resulted from contentious discussions regarding salary arbitration eligibility issues and the possible salary cap. These issues concerned whether players in their second year could be eligible for salary arbitration. The player's sought eligibility for salary arbitration for players in their second year of employment. The owners desired to limit salary arbitration only to players who have at least completed three years of service in MLB. This agreement set player eligibility for salary arbitration below the three year level, increased management pension contributions, and raised the minimum salary to \$100,000.¹⁰⁶

Yet the players went on strike again in 1994 after tensions between the players and owners over controlling salary negotiations and free agency peaked.¹⁰⁷ The strike culminated in the close of the season and the cancellation of the World Series for the first time since 1904.¹⁰⁸ In order to abate the strike, on March 31, 1995, Judge Sonia Sotomayor ordered an injunction forcing the owners to reinstate the free agency/reserve systems and its salary arbitration provisions of the 1990 Basic Agreement.¹⁰⁹ Consequently, since the origins of baseball arbitration, as exemplified by the final outcome in 1995, the arbitration proceedings

SINCE the origins of baseball arbitration, as exemplified by the final outcome in 1995, the arbitration proceedings concerning salary disputes have been refined dramatically and the integration of FOA has set MLB salary arbitration apart from the rest of professional sports.

concerning salary disputes have been refined dramatically and the integration of FOA has set MLB salary arbitration apart from the rest of professional sports.¹¹⁰ The purpose of MLB's salary arbitration process was to provide an alternative to strike and lockouts in the league.¹¹¹

Final offer, or last-best offer, arbitration was designed to induce settlement between the parties as an alternative to strikes and lockouts.¹¹² First, the process requires that the arbitrator choose either the player's proposal or the owner's offer.¹¹³ There is no room for the arbitrator to choose a number between the offers or compromise in any way.¹¹⁴ Great risk is therefore involved if the parties do not come to an agreement before the arbitrator awards a salary.¹¹⁵ Final offer arbitration encourages players and owners to negotiate in good faith and compromise in order to avoid leaving the decision up to the arbitrator.¹¹⁶ To meet those ends, both players and owners in negotiating the collective bargaining agreement determine the criteria to invoke salary arbitration and what arbitrators may consider in rendering a decision.

C. Criteria and Procedures for Salary Arbitration in Major League Baseball

Crucial components of salary arbitration provisions in collective bargaining agreements relate to: who is eligible for salary arbitration, who the arbitrators are, how many arbitrators preside over the hearing, and what criteria the arbitrator may take into consideration when making his or her determination.¹¹⁷ Presently, in regard to salary arbitration, the collective bargaining agreement permits all players with three to six years of major league service to be eligible for salary arbitration.¹¹⁸ Players with more than six years of service must acquire their team's consent prior to filing for salary arbitration.¹¹⁹ The agreement also permits certain players, known as the super twos, with more than two years but less than three years of service, to use salary arbitration if they have "accumulated at least 86 days of service during the immediately prior season" and "ranks in the top seventeen percent of the player[s] in the two year service group."¹²⁰

The procedures for MLB salary arbitration commences after the World Series.¹²¹ The MLB Players Association (hereinafter MLBPA) and the owners' Player Relations Committee (hereinafter PRC) mutually select a panel of three arbitrators from a roster of approximately twenty-four arbitrators provided by the American Arbitration Panel.¹²² The number of arbitrators, as a result of the collective bargaining process, had changed from a single arbitrator to a panel of three arbitrators in 2000-2001. The bargaining compromise increasing the panel to three went in favor of the clubs. A single arbitrator is cheaper, and therefore, favored by the players. However, the clubs desired a panel of three because of a lack of trust in a single arbitrator who may be

motivated by retaining his or her position, whereas, a three arbitrator panel with confidential voting would guarantee impartial decisions unhampered by personal employment motives.¹²³ The arbitrators are seasoned in MLB salary arbitration and labor grievance cases.¹²⁴ Once a player is eligible for salary arbitration, he may file for arbitration between January 1 and January 15.¹²⁵ Subsequently, once salary arbitration is invoked, the MLBPA and the PRC notify the arbitrators when they will be needed for the hearings.¹²⁶ The salary arbitrations are then held between February 1 and February 20. Arbitrators are paid a flat fee of \$750 for each scheduled case.¹²⁷ The costs are split between the player and the club.¹²⁸ The arbitrators are not informed of which player's case they will hear.¹²⁹

MLB arbitration is "last best offer" or FOA. The two sides each have one hour to state their position followed by a thirty minute rebuttal period.¹³⁰ The arbitrators announce their decision within twenty-four hours without any written opinion.¹³¹ The decision is binding and not open to appeal. The decisions are publicized throughout the season rather than being announced simultaneously at the end of the season.¹³² The arbitration process as a whole is not kept confidential; however, the contents of communications within the arbitration and the reason for the decision are not publicized because the arbitrators do not write an opinion. Confidentiality lends to a more communicative discussion of interests often assisting in the resolution process.

The collective bargaining agreement also catalogs what criteria may be considered by the arbitrators when making a decision. Article VI, Section (F) (12) of Major League Baseball's Basic Agreement provides the criteria (a list of ten factors) which arbitrators may or may not consider in rendering their decisions.¹³³ This provision states:

(A) The criteria will be the quality of the Player's contribution to his Club during the past season (including but not limited to his overall performance, special qualities of leadership and public appeal), the length and consistency of his career contribution, the record of the Player's past compensation, comparative baseball salaries . . . , the existence of any physical or mental defects on the part of the Player, and the recent performance record of the Club including but not limited to its League standing and attendance as an indication of public acceptance . . .

(B) Evidence of the following shall not be admissible:

- (i) The financial position of the Player and the Club;
- (ii) Press comments, testimonials or similar material bearing on the performance of either the Player or the Club, except that recognized annual Player awards for playing excellence shall not be excluded;
- (iii) Offers made by either Player or Club prior to arbitration;
- (iv) The cost to the parties of their representatives, attorneys, etc.;

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(v) Salaries in other sports or occupations.¹³⁴

MLB has tailored this aspect of the collective bargaining agreement to best serve its needs as a professional sports league by omitting the possibility for consideration of terms without the agreement and specifically pre-determining what criteria the arbitrators may consider. However, the agreement does not specify how much weight an arbitrator must give to any of the provisions.¹³⁵ Consequently, the parties instruct the arbitrators to allocate "such weight to the evidence as shall appear appropriate under the circumstances."¹³⁶ For example, the weight given

unique solution."¹⁴² Therefore, an arbitrator in the conventional arbitration context has more discretion in deciding the outcome of a dispute. Parties to conventional arbitration believe that the arbitrator will more probably compromise between the two positions than go with one of the parties' proposals.¹⁴³ This alleviates the extreme risk incurred by FOA. That is, the arbitrator may choose the other party's number, which often deviates from the first party's offer by millions of dollars. Parties are less disposed to good faith negotiations when they believe that a better outcome may result from the arbitrator's decision,¹⁴⁴ and

they often undervalue the risk of arbitration and the probability that the arbitrator will not compromise.¹⁴⁵ Parties to conventional arbitration regularly take extreme positions during arbitrations, believing that their position may influence the arbitrator's decision making

SALARY arbitration provides the players with a viable alternative to having the owners dictate their salaries by assigning the decision to a neutral third party who will objectively weigh the player's true market value.

to the player's performance versus that of comparable players' salaries is up to the arbitrators' discretion. This may be problematic in that more discretion is given to the arbitrator in determining how to weigh certain variables and, therefore, may result in incongruous determinations. Accordingly, salary arbitration provides the players with a viable alternative to having the owners dictate their salaries by assigning the decision to a neutral third party who will objectively weigh the player's true market value.¹³⁷

III. Final Offer Arbitration: Praise and Criticism

FOA salary arbitration in MLB is a typical example of interest arbitration.¹³⁸ Parties often settle the dispute prior to arbitrator's decision because FOA restricts the ability of the arbitrator to compromise between the parties' final offers. In effect, "baseball's arbitration is a process designed never to be used."¹³⁹ The process consequently leads to a high-cost/high-risk situation for the parties if they do not resolve the dispute themselves.¹⁴⁰ As a result, in comparison to conventional arbitration, FOA fosters negotiated settlement by the parties prior to the arbitration hearing.¹⁴¹

A. Final Offer Arbitration v. Conventional Arbitration

Conventional arbitration is a process where "a bargaining impasse is submitted to an arbitrator who selects either party's position on one or all of the pending issues, compromises between the parties' positions or awards a

process.¹⁴⁶ Consequently, conventional arbitration alleviates parties' fear of an outright loss and effectually undercuts the motivation to bargain in good faith and propose realistic offers prior to arbitration.¹⁴⁷

The inevitable risk in FOA is that the arbitrator can pick between one of only two positions; this acts as a "psychological, economic and political incentive" for parties to negotiate in good faith and resolve the dispute on their own.¹⁴⁸ In effect, the risk of losing the arbitration neutralizes the "chilling effect" created by conventional arbitration upon parties' willingness to negotiate in good faith.¹⁴⁹ In the context of labor disputes, arbitration acts as an instrument for negotiated settlement and not as the primary tool for settling salary¹⁵⁰ disputes because of the high risk in letting the arbitrator render a final decision, which may not be your number.

B. Final Offer Arbitration Fosters Negotiation and Self Party Resolution

FOA encourages settlement by the parties for a number of reasons. First, parties are motivated to settle because of the incentive to avoid the extreme risk associated with FOA.¹⁵¹ Second, the parties rationally bargain in good faith in order to resolve the dispute on their own, thereby engendering a presentation of their most reasonable position to the other party prior to the hearing.¹⁵² Moreover, the arbitrator's inability to compromise eradicates unreasonable negotiating positions.¹⁵³ Third, as figures are proposed simultaneously by the parties,¹⁵⁴ they cannot evaluate the opposing party's offer and thereafter propose a counter offer

based on that evaluation.¹⁵⁵

The fourth incentive to settle the dispute prior to the hearing is based upon the distributive properties of salary arbitration. FOA's reasonable final offers provide a midpoint and a range of numbers to focus the negotiations when numbers are the only issue.¹⁵⁶ Each side can judge how the arbitrator will value the disputed item, which helps the parties predict which offer the arbitrator will choose.¹⁵⁷ The offer closest to the arbitrator's value is likely to win the arbitration, and the parties then settle accordingly.¹⁵⁸ Prior to the FOA hearing and the arbitrator's decision, the parties were aware of the midpoint number and could effectively evaluate whether the player was worth more or less than the midpoint.¹⁵⁹ Consequently, this numbers game provided a negotiable midpoint that promotes settlement.¹⁶⁰ If the parties' positions were considerably different, the parties had an economic incentive to settle.¹⁶¹ Thus, in FOA, where the discrepancy between the numbers is large, increasing the risk of allowing the arbitrator render a decision, the parties can focus on the midpoint number. This midpoint number now becomes the negotiable number from which the parties can better evaluate the strength of their positions fostering party negotiation and settlement. On the other hand, if the parties' proposals were close together, the midpoint number may be an agreeable number, or the parties could more easily compromise to find an amenable number.¹⁶²

The fifth motivation for the parties to settle the dispute on their own terms is predicated upon interest-based incentives. One advantage of settling the dispute is to circumvent the mutual costs of the arbitration process. In addition, the parties can generate a mutually beneficial settlement while including non-salary terms in the agreement. In negotiation for settlement agreements, the parties can fashion creative solutions for a win-win resolution to the dispute. Players are more inclined to settle because they can contract to secure benefits such as bonuses, no trade clauses, guaranteed contracts, multi-year deals, or other more imaginative clauses including single occupancy rooms on road trips or initial payment of hotel charges rather than reimbursement.¹⁶³ Furthermore, the prospect of a multi-year contract ensures job security, which is a very strong motivation for players to avoid salary arbitration.¹⁶⁴

Clubs are motivated to settle for similar reasons. If the parties do go to arbitration, the club will likely assume a litigious and confrontational posture.¹⁶⁵ Clubs frequently assert arguments criticizing the player's past record, physical or mental defects, playing record, public appeal and his contributions to the team.¹⁶⁶ This can only complicate the relationship, whereas settlement may actually foster positive, future relations between the two parties.¹⁶⁷ The clubs could very well be interested in signing a multi-year contract with the player to ensure future services.¹⁶⁸ In contrast, if the parties wait for the arbitrator's decision, the standard contract following the arbitration is for only one year at

specified salary.¹⁶⁹ Accordingly, due to the risks involved in allowing the arbitrator to render a final judgment, and the other incentives to negotiate and settle, ninety percent of baseball salary arbitration cases are settled prior to the hearing itself.¹⁷⁰ As a principle purpose of FOA is to foster negotiation and settlement prior to the final judgment, FOA is indeed a successful process.

C. Criticisms of Final Offer Arbitration in Major League Baseball

One criticism of MLB's use of FOA is that it has effectively led to significant increases in players' salaries — even for mediocre players.¹⁷¹ The current system of salary arbitration seems to unfairly favor the players because owners are "obligated to participate if a player qualifies, have no control over what they will pay their players, and [it] results in budget-busting salaries."¹⁷² Hence, it would seem that the owners are in a lose-lose situation.¹⁷³ Even though its purpose is to avoid strikes and lockouts, MLB's salary arbitration system has become a major source of contention and discord and sometimes results in both. However, prior to the implementation of the salary arbitration system, MLB still saw strikes and lockouts arising out of salary disputes. After the implementation of salary arbitration, strikes and lockouts concerned the terms of the salary arbitration system itself rather than specific player salaries.¹⁷⁴ For example, the players went on strike in 1985 due to unresolved issues regarding the salary cap and arbitration.¹⁷⁵ Moreover, in 1990, the owners instituted a lockout over the same issues for thirty-two days.¹⁷⁶

A second criticism of FOA, known as the "narcotic effect," is prevalent in any form of arbitration.¹⁷⁷ The narcotic effect basically motivates parties who have previously relied upon the system to use it exclusively to solve future disputes and impasses. Research has determined that this phenomenon is a customary result in FOA because parties who have employed FOA make use of the system more readily than those who use conventional arbitration.¹⁷⁸ It can be argued that this is so because the process yields positive results, thus, players who have experienced it choose to invoke the process again, seeking to once again achieve a negotiated settlement and increasing their salaries.

A third criticism is that FOA stimulates gamesmanship;¹⁷⁹ that parties tend to concentrate on predicting the mindset of the arbitrator instead of attempting to resolve the dispute.¹⁸⁰ Salary arbitration becomes a "battle ground of statistics,"¹⁸¹ where the party that can structure the stronger line of reasoning, based on the numbers, wins the case.¹⁸² This argument is often tailored to appease the arbitrator while detracting from the prospect of a negotiated settlement. In addition, limiting the subject matter for determination by a neutral third party to just salary may restrict the prospect for settlement.¹⁸³

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The criticisms of FOA can be attributed to other variants within MLB, or are simply misdirected. MLB is a business worth millions, even billions of dollars. To attribute the increase in salaries solely to the implementation of salary arbitration is simplistically misleading.¹⁸⁴ Moreover, as the

FOA process, settle prior to the hearing more often than other forms of arbitration.¹⁹⁶ Thus, by way of the narcotic effect, the process results in the settlement of more disputes.¹⁹⁷

Finally, even if FOA promotes gamesmanship by the parties, the process nevertheless "encourages reasonable final offers that facilitate settlement."¹⁹⁸ In MLB, players and clubs are motivated to settle before the arbitration hearing.¹⁹⁹ Moreover, the fact that it is simply a numbers game provides the parties with a more readily negotiable figure, once the midpoint is determined in negotiations prior to the FOA hearing.²⁰⁰ Taking both the praise and criticism of FOA into consideration, the

current system employed by MLB truly works. The system is an exceptional and superior dispute resolution process that provides an expeditious alternative to litigation while alleviating the costly, time-consuming, and bitter results that often accompany other forms of arbitration.

FOA has effectively controlled salary inflation where owners in the free market scenario could not.

next section will demonstrate, the narcotic effect in the baseball context has actually led to an increasing amount of negotiated settlement, and has had a receding effect on the number of strikes and lockouts in the league. Furthermore, even though gamesmanship may occur in FOA, the evidence still suggests that the process is successful and parties predominantly settle their disputes rather than moving to arbitration.

D. Responses to Criticisms

Although FOA in MLB is one possible source of the enormous increase in players' salaries, the clubs have won 236 out of 417 cases that have reached arbitration since 1974.¹⁸⁵ The rise in player salaries can also be attributed to inflation, increases in free agents, the enormous surplus attained through multi-million dollar television contracts, the profits returned from ticket sales, merchandise, and even skyboxes.¹⁸⁶ Prior to salary arbitration, players' salaries were artificially low under the reserve clause.¹⁸⁷ Moreover, in contrast to the notion that salary arbitration is the cause of salary inflation, "compensation for players eligible for salary arbitration, however, has remained almost stable over the past six years while free agent salaries have ballooned in the competitive free market."¹⁸⁸ Accordingly, it is possible to contend that FOA has effectively controlled salary inflation where owners in the free market scenario could not.¹⁸⁹ The statistics demonstrate that the current method of salary arbitration in MLB has served its moderating purpose well.¹⁹⁰ There are no holdouts by those players who are eligible for salary arbitration as opposed to players in other professional sports.¹⁹¹ The cases are resolved expeditiously, and the players all report to their spring training.¹⁹²

As previously noted, the narcotic effect is prevalent in all forms of arbitration.¹⁹³ Although there is a discernible narcotic effect in FOA, research demonstrates that FOA is implemented a great deal more often than FOA hearings.¹⁹⁴ The implementation of FOA therefore facilitates negotiation and settlement.¹⁹⁵ Parties may invoke the process more often than the other forms of arbitration, but they also, in the

IV. Conclusion: The Statistics Don't Lie

Historical conflicts in MLB throughout its history mandate a system that can readily manage the over abundance of disputes. FOA is the appropriate system for MLB salary disputes because it fosters party negotiation and good faith bargaining that frequently results in settlement rather than actual arbitration.²⁰¹ The purpose of FOA is to do just that, and the process has done an extraordinary job in achieving its objective.²⁰² More than eighty percent of cases filed for arbitration in MLB are settled before the hearing.²⁰³ Conversely, even if the parties cannot settle prior to the arbitration, the system affords an expeditious, informal and final resolution for the parties.²⁰⁴ Chart A²⁰⁵ demonstrates that FOA is a truly effective process for encouraging negotiation and party settlement prior to the arbitration.

According to the statistics, players have filed well over two thousand claims for salary arbitration, but only four-hundred twelve of those cases actually entered the process. Salary arbitration, therefore, is an effective process that fosters party negotiation and, eventually, settlement.

On the other hand, even though the majority of cases are settled before the actual hearing takes place, the average rise in player salary has increased. Owners claim that FOA is the primary and sole cause of the inflated salaries of MLB players in the past thirty years.²⁰⁶ Salaries have indeed inflated greatly since the inception of salary arbitration in MLB.²⁰⁷ Yet salary arbitration has actually kept the players' salaries in check. Chart B demonstrates that, between the years of 1991 and 1998, the average player salary has remained relatively stable since 1993.

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CHART A: Historical Results of Salary Arbitration

Year Team	Players Filed	Settled before Arbitration	Released Before Case	Entered Process	Player Won	
Won						
1974	53	24	0	29	13	16
1975	38	23	0	15	6	9
1978	16	7	0	9	2	7
1979	40	24	2	14	8	6
1980	65	39	0	26	15	11
1981	96	74	1	21	11	10
1982	103	80	1	22	8	14
1983	88	57	1	30	13	17
1984	80	70	0	10	4	6
1985	97	84	0	13	6	7
1986	160	125	0	35	15	20
1987	109	83	0	26	10	16
1988	108	90	0	18	7	11
1989	135	123	0	12	7	5
1990	161	137	0	24	14	10
1991	159	142	0	17	6	11
1992	157	137	0	20	9	11
1993	118	100	0	18	6	12
1994	91	75	0	16	6	10
1995	58	50	0	8	2	6
1996	76	66	0	10	7	3

CHART B: Average Salary Figures for Players with three and four years of Major League Service from 1991 to 1998

Year	Three-years major league service (\$)	Four-years major league service(\$)
1991	670,930	1,194,205
1992	855,880	1,275,992
1993	906,198	1,667,404
1994	1,092,179	1,539,654
1995	1,082,092	1,999,746
1996	1,042,118	1,609,511
1997	926,033	1,666,583
1998	1,041,025	1,601,351

According to the above chart, player salaries have not increased for those players with three and four years of major league service since 1994. Thus, when examining the entire scope of the financial framework of MLB, the relative salaries have not increased as dramatically as critics claim.²⁰⁸ The adverse affect of player salary inflation can be attributed to other variables in MLB, such as inflation, free agency, surplus from television contracts, increased ticket sales, merchandizing, etc.²⁰⁹ Moreover, owners do not have to renew the contract of a player who files for salary arbitration.²¹⁰ The owners have the ability to cut the player instead of participating in arbitration that may lead to a higher salary.²¹¹ If the owners feel that it is not worth it to participate in salary arbitration, they can forego keeping the player on

the team.²¹²

Salary arbitration plays an essential role in the overall machinery of MLB. The system affords a viable alternative to litigation and more importantly to league strikes and lockouts. The players are able to contest their salary disputes, and the owners are able to maintain an operating organization. Taken as a whole, FOA certainly manages to keep MLB intact. Hundreds of cases are filed for arbitration yearly, however, almost all of them settle prior to the hearing. Given that MLB will continue to procure millions of dollars in revenue annually, that free agents will compete on the market, and that salary disputes will inevitably continue, MLB's system of FOA is ultimately the most dependable and efficient system to maintain stability in the league.

Major League Baseball's Answer to Salary Disputes and the Strike

ENDNOTES

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¹ See Jeffrey S. Moorad, *Major League Baseball's Labor Turmoil: The Failure of the Counter-Revolution*, 4 VILL. SPORTS & ENT. L.J. 53, 53 (1997) ("since professional baseball began in 1869, labor relations between players and club owners have been highly contentious"); see also Ethan Locke, *The Scope of Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 340 (1989) ("In the NFL, the bitter history of labor relations suggested the possibility of unfair labor practice charges..."); Kenneth A. Kovach et al., *Leveling the Playing Field*, available at http://research.moore.sc.edu/Publications/B&EReview/Be44_1/sports.htm (October 13, 1997) ("professional sports have experienced open labor warfare. Most of these disputes have spilled over into the American political and legal arenas and, in the end, the sports have suffered, and sports consumers, i.e., the fans have become victims of labor chaos and conflict"); see also, e.g., Dan Messeloff, *The NBA's Deal with the Devil: The Antitrust Implications of the 1999 NBA-NBPA Collective Bargaining Agreement*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 521, 521 (2000) (on January 7, 1999, an agreement between the National Basketball Association and the National Basketball Player's Association after a "six month lockout...rescued the NBA from becoming the first professional sports league to cancel an entire season due to labor strife").

² Arbitration is defined as "a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding." BLACK'S LAW DICTIONARY 100 (7th ed. 1999). [hereinafter BLACK'S]

³ Collective Bargaining Agreement is defined as "a contract that is made between an employer and a labor union and that regulates employment conditions." *Id.* at 257; see also Kovach et al., *supra* note 1 ("collective bargaining is '...the process by which union representatives for employees in a bargaining unit negotiate employment conditions for the

entire bargaining unit'").

⁴ RAY YASSER, *SPORTS LAW: CASES AND MATERIALS* 495 (1985); see also Kovach et al., *supra* note 1 ("Major League Baseball has had eight work stoppages since 1972, with player strikes or owner lockouts causing the cancellation or postponement of games in 1972, 1981, 1985, and 1994, as well as spring training's cancellation in 1990").

⁵ See, e.g., Moorad, *supra* note 1, at 83 (noting reports that players lost \$243,000,000 in wages due to cancelled games in 1995 and owners lost \$376,000,000 in reduced attendance and television revenues in 1994 and \$326,000,000 in lost attendance in 1995).

⁶ See *id.* and accompanying text.

⁷ See Moorad, *supra* note 1, at 53-54.

⁸ See *id.* at 54. Labor disputes in MLB are a reaction to the arrival of the collective bargaining agreement. "The tension that characterizes baseball's labor relations is the product of almost a century of near-total owner hegemony over the game and its players' careers through the use of the infamous reserve clause." *Id.*

⁹ See Elissa M. Meth, *Final Offer Arbitration: A Model for Dispute Resolution in Domestic and International Disputes*, 10 AM. REV. INT'L. ARB. 383, 386 (1999) (salary arbitration "...replaces the strike, which is the cost of disagreement in traditional collective bargaining relationships..."); see also LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 512 (2d ed. 1997) (arbitration is a substitute for the strike, "that is, a substitute for strikes over unresolved grievances. This meant ... that arbitration should be regarded as an extension of the collective bargaining process").

¹⁰ See MICHAEL J. COZZILLIO & MARK S. LEVINSTEIN, *SPORTS LAW: CASES AND MATERIALS* 747 (1997).

¹¹ See *id.*; see also *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n*, 532 F.2d 615, 619 (8th Cir. 1976) ("in resolving questions of arbitrability, the courts are guided by Congress's declaration of policy that arbitration is the desirable method for settling labor disputes").

¹² Although disputes over salaries are not the only arbitral grievance in professional sports, this paper will focus solely on salary arbitration.

¹³ See generally Meth, *supra* note 9, at 384 (final offer arbitration is a new form of arbitration in the United States); see also Roger I. Abrams, *Interdisciplinary Program Series: Inside Baseball's Salary Arbitration Process*, 6 U. CHI. L. SCH. ROUNDTABLE 55, 55 (1999) ("baseball's version of salary arbitration is unique in

American Labor relations"); see also Jonathan M. Conti, *The Effect of Salary Arbitration on Major League Baseball*, 5 SPORTS LAW. J. 221, 230 ("One of the major factors which makes salary arbitration in baseball so unique is that it is final offer, or high/low, format. It differs from conventional arbitration in that final offer arbitration gives the arbitrator very little discretion. Each side submits a figure, and the arbitrator is required to select one offer or the other. The arbitrator cannot formulate a compromise figure, or even choose the exact midpoint between the two, which is an option in conventional arbitration").

¹⁴ RISKIN & WESTBROOK, *supra* note 9, at 502.

¹⁵ *Id.*

¹⁶ See YASSER, *supra* note 4, at 495.

¹⁷ Arbitrations may be open to the public if they are of clear public concern. See YASSER, *supra* note 4; see also RISKIN & WESTBROOK, *supra* note 9, at 502 (observing that arbitrations are normally conducted in private).

¹⁸ See RISKIN & WESTBROOK, *supra* note 9, at 502. This is understood because it is regularly stipulated in the arbitration agreement. However, in mandatory arbitration parties are not bound by the arbitrator's decision as they have a right to a trial *de novo*.

¹⁹ See *id.* at 495, 533; see also RISKIN & WESTBROOK, *supra* note 9.

²⁰ See YASSER, *supra* note 4.

²¹ See RISKIN & WESTBROOK, *supra* note 9, at 503 (noting that some new systems of arbitration differ greatly from traditional private arbitration).

²² See *id.* at 503, 589-90.

²³ BLACK'S, *supra* note 2, at 100 ("arbitration that involves settling the terms of a contract being negotiated between the parties; esp. in labor law, arbitration of a dispute concerning what provisions will be included in a new collective-bargaining agreement").

²⁴ See COZZILLIO & LEVINSTEIN, *supra* note 10, at 748. Other types of arbitration are ad hoc arbitration, adjudicative-claims arbitration, compulsory arbitration, judicial arbitration and voluntary arbitration. BLACK'S, *supra* note 2, at 100.

²⁵ Thus, in interest arbitration for example, the dispute revolves around the contractual terms indicating how much a player's salary is. See ABRAMS, *supra* note 13, at 57 ("today's

salary arbitrators determine the most important term of a ballplayer's contract, his salary for the coming season").

²⁶ Strikes and lockouts are often the result of disagreements in the traditional collective bargaining relationships between the owners and players regarding salary disputes. See *id.* ("interest arbitration ... consists of an arbitration mechanism to establish the terms of a collective bargaining agreement"); see also METH, *supra* note 9, at 386 ("interest arbitration replaces the strike, which is the cost of disagreement in traditional collective bargaining relationships, with the risk that a third party will implement a settlement").

²⁷ Grievance arbitration is also known as rights arbitration; BLACK'S, *supra* note 2, at 100.

²⁸ COZZILLIO & LEVINSTEIN, *supra* note 10, at 748.

²⁹ See *id.* at 749 (noting that "it [grievance arbitration] involves seeking the aid of a neutral arbitrator to set the terms rather than interpret the terms of an agreement").

³⁰ See METH, *supra* note 9, at 386 n.9.

³¹ See RISKIN & WESTBROOK, *supra* note 9, at 503-04; see also COZZILLIO & LEVINSTEIN, *supra* note 10, at 749.

³² See YASSER, *supra* note 4.

³³ See *id.* at 496 (observing that collectively bargained for arbitration clauses cover a variety of issues); see also COZZILLIO & LEVINSTEIN, *supra* note 10.

³⁴ COZZILLIO & LEVINSTEIN, *supra* note 10.

³⁵ See *id.*; see, e.g., *Southland Corp. v. Keating*, 465 U.S. 1 (1984). This case sought to overturn §31512 of the California Franchise Investment law, which provides that "any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void." *Id.* at 5 n.1. This is an example of a state trying to circumvent the Federal Arbitration Act. However, the Court noted that there is "nothing in the [Federal Arbitration] Act indicating that the broad principle of enforceability is subject to any additional limitations under State law." *Id.* at 11.

³⁶ RISKIN & WESTBROOK, *supra* note 9, at 522 ("Not only is the FAA a substantive statute that governs in state as well as federal courts, superceding conflicting state law..."); see also *Southland*, 465 U.S. at 16 ("in creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements").

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³⁷ *Id.*

³⁸ RISKIN & WESTBROOK, *supra* note 9, at 527 (“... cases have reinforced the strong federal policy favoring arbitration ...”).

³⁹ COZZILLIO & LEVINSTEIN, *supra* note 10, at 747.

⁴⁰ The National Labor Relations Act is a federal statute regulating the relations between employers and employees and establishing the National Labor Relations Board. 29 USCA §§ 151-169 (2003). “The statute is also known as the Wagner Act of 1935. It was amended by the Taft-Hartley Act of 1947 and the Landrum-Griffin Act of 1959.” BLACK’S, *supra* note 2, at 1046-47.

⁴¹ See also *Davis v. Pro Basketball*, 381 F.Supp. 1, 3 (S.D.N.Y. 1974) (“Once a court has determined that a dispute must be submitted to arbitration, any procedural questions which arise out of the dispute must be decided by the arbitrators”); *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass’n*, 532 F.2d 615, 619 (8th Cir. 1976) (“if it is determined that the arbitrator had jurisdiction, judicial review of his award is limited to the question of whether it ‘draws its essence from the collective bargaining agreement’”); YASSER, *supra* note 4, at 533 (“Courts will evaluate the process only to make sure it is not fundamentally unfair”).

⁴² YASSER, *supra* note 4, at 748.

⁴³ *Id.* at 533.

⁴⁴ See Moorad, *supra* note 1 (professional baseball labor relations have been highly contentious since its inception); see also Abrams, *supra* note 13 (“Baseball’s salary arbitration traces its origin back more than a century to the procedures used to resolve labor-management negotiating disputes in unionized sectors of the economy”); see also JOSEPH GORDON HYLTON & PAUL M. ANDERSON, *SPORTS LAW AND REGULATION* 155 (1999); see also Gary D. Way, *Sudden Death: League Labor Disputes, Sports Licensing, and Force Majeure Neglect* 7 MARQ. SPORTS L.J. 427, 428 (1997).

⁴⁵ See 3:2 *Labor Management Relations Act of 1947 (Taft-Hartley Act)*, Policy and Procedure Manual, Office of Human Resources, Princeton University, at <http://www.princeton.edu/hr/policies/appendix/a302.htm> (last updated March 21, 1997) (“The Taft-Hartley Act, an amendment to the National Labor Relations Act (NLRA) of 1932, was passed in 1947 to restore a more balanced relationship between labor and management. It gives employees the right to refrain from participating in union activities and adds a series of prohibited unfair labor practices by unions”).

⁴⁶ See LIONEL S. SOBEL, *PROFESSIONAL SPORTS AND THE LAW* 93

(1977).

⁴⁷ Abrams, *supra* note 13, at 57 (“... the National League called its council of owners that administered league policy its ‘board of arbitration.’ The league did not intend the board to be neutral, but rather act as the instrument of baseball’s management”).

⁴⁸ See *id.*

⁴⁹ See Conti, *supra* note 13, at 224 (“Once a player signed his first contract with a particular team, he was bound to that club for the rest of his playing days. He was the property of that team... . If the player did not like his contract he could either deal with it and continue to play or he could retire from the game permanently”).

⁵⁰ *Id.*; see also Marc Chalpin, *It Ain’t Over ‘Til It’s Over: The Century Long Conflict Between the Owners and the Players in Major League Baseball*, 60 ALB. L. REV. 205, 207-17 (1996) (discussing the history of salary negotiation).

⁵¹ See Chalpin, *supra* note 50, at 208; see also Conti, *supra* note 13, at 224 (explaining that due to the reserve clause, “once a player signed his first contract with a particular team, he was bound to that club for the rest of his playing days. He was the property of the team. The reserve clause gave the team the option to renew a player’s contract under the terms of the previous contract. This amounted to a situation in which the player’s contract could be renewed every year, with or without the player’s consent, thereby binding him in perpetuity to his original team”).

⁵² See Chalpin, *supra* note 50, at 208; see also Conti, *supra* note 13, at 224 (“the reserve system was eventually expanded to cover the entire team and by the 1880s, the owners were inserting a reserve clause in each individual player’s contract”).

⁵³ Chalpin, *supra* note 50, at 208; see also Moorad, *supra* note 1 (stating that the reserve system was eventually overcome in the 1970s after much litigation, arbitration and collective bargaining).

⁵⁴ Chalpin, *supra* note 50, at 208; see also Conti, *supra* note 13, at 224.

⁵⁵ Chalpin, *supra* note 50 at 208; see also Conti, *supra* note 13, at 224 (noting that the player could “continue to play for his current team or permanently retire from baseball”).

⁵⁶ See Conti, *supra* note 13, at 224.

⁵⁷ *Federal Baseball Club of Baltimore, Inc. v. National League of Prof’l Baseball Clubs*, 259 U.S. 200, 207 (1992).

⁵⁸ *Id.*

⁵⁹ Chalpin, *supra* note 50, at 210-11.

⁶⁰ See Moorad, *supra* note 1, at 56.

⁶¹ See *Federal Baseball Club of Baltimore, Inc.*, 259 U.S. at 207.

⁶² *Id.*

⁶³ See Chalpin, *supra* note 50, at 211.

⁶⁴ See Moorad, *supra* note 1, at 57 ("there have been heightened efforts to overturn baseball's antitrust exemption ... in connection with the labor unrest of the mid-1990s").

⁶⁵ *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953).

⁶⁶ See *id.* at 357 ("we think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation").

⁶⁷ See Conti, *supra* note 13, at 255.

⁶⁸ See *Toolson*, 346 U.S. at 356.

⁶⁹ See *id.*

⁷⁰ See Conti, *supra* note 13, at 225 (referring to "Toolson's allegations of the owners' antitrust violations, namely the attempt to monopolize professional baseball and the unreasonable restraints of the reserve clause").

⁷¹ *Toolson*, 346 U.S. at 357.

⁷² *Flood v. Kuhn*, 407 U.S. 258, 282-83 (1972).

⁷³ *Id.* at 265.

⁷⁴ *Id.*; See also Conti, *supra* note 13, at 225 ("he refused to play for the Phillies and instead sat out the season with the intention of signing with the team of his choice the following year").

⁷⁵ *Flood*, 407 U.S. at 258.

⁷⁶ *Id.*

⁷⁷ Chalpin, *supra* note 50, at 216-17.

⁷⁸ *Id.* at 217.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See Conti, *supra* note 13, at 226. Marvin Miller was appointed president of the Major League Players' Association in 1966. *Id.*

⁸² *Id.* ("Miller accomplished for the players what three unsuccessful legal challenges of the reserve system could not: equal bargaining power between the players and clubs. In 1969, the National Labor Relations Board indirectly approved the players' union's bargaining status...").

⁸³ *Id.* (commenting that "... by 1973, the players' union had acquired enough bargaining strength to extract a salary arbitration provision from the owners").

⁸⁴ See YASSER, *supra* note 4.

⁸⁵ Chalpin, *supra* note 50, at 217.

⁸⁶ *Id.* at 218; see also COZZILLO & LEVINSTEIN, *supra* note 10, at 755.

⁸⁷ See Conti, *supra* note 13, at 227 (a pitcher for the Los Angeles Dodgers, Andy Messersmith, challenged the reserve clause through grievance arbitration).

⁸⁸ *Id.*

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See *id.*

⁹⁵ Chalpin, *supra* note 50, at 219.

⁹⁶ See Moorad, *supra* note 1, at 58.

⁹⁷ See *id.* at 59.

⁹⁸ *Id.*; see also Chalpin, *supra* note 50, at 219.

⁹⁹ Moorad, *supra* note 1, at 58-59.

¹⁰⁰ See generally *id.* (noting midseason strike in the 1980-1981 season and 1984-1985 season). See also Chalpin, *supra* note 52, at 223, 224 (counting eight players' strikes between

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1972 and 1994).

¹⁰¹ Robert A. McCormick, *Baseball's Third Strike: The Triumph of Collective Bargaining in Professional Sports*, 35 VAND. L. REV. 1131, 1169 (1982).

¹⁰² *Id.*

¹⁰³ See generally Conti, *supra* note 13. Unionization of players, the collective bargaining agreement and the implementation of salary arbitration in Major League Baseball provided players with better bargaining power. *Id.*

¹⁰⁴ See *id.* (observing that owners have always sought to abolish salary arbitration from the collective bargaining agreement).

¹⁰⁵ See *id.* at 247.

¹⁰⁶ See Moorad, *supra* note 1, at 59. Major league minimum salary was increased from \$68,000 to \$100,000. *Id.*

¹⁰⁷ See Chalpin, *supra* note 50, at 224 (suggesting that the 1994 strike was probably a product of the requirement that 75% of the owners reach agreement any "peace agreement with the players" and the fact that there was, at the time, no Commissioner of Baseball, as the former commissioner was "forced out" because the owners did not want a commissioner involved in salary disputes). In addition, failure of the Basic Agreement could be attributed to the great distrust that developed between both parties during previous strikes and lockouts. The possibility exists that management wanted to use the 1994 strike to "finally fac[e] down the players. They [could] now declare a bargaining impasse and attempt to impose a new system on their terms - the beginning of a salary cap, the end of salary arbitration and whatever else their hearts' desire. The owners had lost every labor dispute since 1972, and many may have thought that the 1994 strike presented a good opportunity to regain some control over the industry." John Helyar, *Fat Lady Sings: How Fear and Loathing in Baseball Wrecked the Season*, WALL ST. J., Sept. 15, 1994, at A1.

¹⁰⁸ Chalpin, *supra* note 50, at 224.

¹⁰⁹ *Id.* at 227; see also Silverman v. Major League Baseball Player Relations Comm., Inc., 880 F.Supp. 246, 261 (S.D.N.Y. 1995), *aff'd*, 67 F.3d 1054 (2d Cir. 1995).

¹¹⁰ See Abrams, *supra* note 13, at 55 (noting that the "final offer baseball arbitration process has evolved over twenty-five years").

¹¹¹ See Meth, *supra* note 9, at 386.

¹¹² *Id.* at 384-86 ("the theory predicts that good faith bargaining and the risk of losing will facilitate settlements").

¹¹³ See Abrams, *supra* note 13, at 55; see generally Meth, *supra* note 9, at 386.

¹¹⁴ See Conti, *supra* note 13, at 228.

¹¹⁵ See Meth, *supra* note 9, at 386.

¹¹⁶ *Id.* at 384-85.

¹¹⁷ See Meth, *supra* note 9 (the design of the arbitration includes who are eligible arbitrators and how many arbitrators will preside over hearings); see also Abrams, *supra* note 13 (provisions in the collective bargaining agreement specify the criteria arbitrators use to decide disputes in salary arbitration). See generally Chalpin, *supra* note 50 (collective bargaining agreement determines how salary arbitration is conducted).

¹¹⁸ Abrams, *supra* note 13, at 58; see also Chalpin, *supra* note 50, at 220; Frederick N. Donegan, *Examining the Role of Arbitration in Professional Baseball*, 1 SPORTS LAW. J. 183, 190-91 (1994).

¹¹⁹ Chalpin, *supra* note 50, at 220; see also Donegan, *supra* note 118.

¹²⁰ Abrams, *supra* note 13, at 58.

¹²¹ *Id.* at 61.

¹²² *Id.*

¹²³ Meth, *supra* note 8, at 401-02.

¹²⁴ See Abrams, *supra* note 13, at 61 ("... arbitrators are experienced neutrals, typically members of the Honorary National Academy of Arbitrators, who have resolved labor grievance cases for decades. Most are also veterans of the baseball salary arbitration process").

¹²⁵ Chalpin, *supra* note 50, at 220; see also Donegan, *supra* note 118, at 190-91.

¹²⁶ Abrams, *supra* note 13, at 61.

¹²⁷ *Id.*

¹²⁸ Meth, *supra* note 9, at 398-99.

¹²⁹ Abrams, *supra* note 13, at 61. This practice is probably done so that arbitrators will not do any prior research on the players before the actual hearing. *Id.*

¹³⁰ *Id.* at 71.

¹³¹ *Id.*; see also Chalpin, *supra* note 50, at 220.

¹³² Meth, *supra* note 9, at 404 (“One commentator suggested that all salary arbitration awards should instead be announced simultaneously, thereby prohibiting arbitrators that decide cases late in the arbitration season from attempting to even the number of awards decided in favor of each side. It would also prevent early decisions from influencing late ones”).

¹³³ See Meth, *supra* note 9, at 404-05.

¹³⁴ Major League Baseball, Basic Agreement art. VI(F)(12) (1997); see also Abrams, *supra* note 13, at 58.

¹³⁵ Abrams, *supra* note 13, at 58.

¹³⁶ *Id.*

¹³⁷ See Chalpin, *supra* note 50, at 221.

¹³⁸ See Meth, *supra* note 9, at 386.

¹³⁹ Abrams, *supra* note 13, at 57.

¹⁴⁰ See Meth, *supra* note 9, at 387-88 (“Because FOA prohibits arbitrators from compromising between final offers, it imposes a higher cost than conventional arbitration: the risk that a third party will endorse an adversary’s final offer”).

¹⁴¹ Meth, *supra* note 9, at 388 n.21 (“Research suggests that final offer arbitration, as compared to conventional arbitration, effectively increases the probability of negotiated settlements by requiring the parties to bargain in the context of a high risk ‘strikelike’ impasse resolution procedure”).

¹⁴² *Id.* at 387.

¹⁴³ *Id.*

¹⁴⁴ See *id.*

¹⁴⁵ See *id.*

¹⁴⁶ See *id.*

¹⁴⁷ See Conti, *supra* note 13, at 231 (“In essence, the fear of losing, which presumably encourages the parties to reach a settlement, is missing in conventional arbitration. Thus, the limited risk in going to arbitration may undercut serious negotiations between the parties and discourage the exchange of realistic proposals prior to the arbitration hearing”).

¹⁴⁸ Meth, *supra* note 9, at 388.

¹⁴⁹ See *id.* at 387.

¹⁵⁰ See Conti, *supra* note 13, at 231.

¹⁵¹ *Id.*; see also Abrams, *supra* note 13, at 61-62. “The final offer aspect of arbitration compels parties to move their positions closer together. The settlement dynamic operates in baseball salary arbitration because it is based on the final-offer principle.” *Id.* “If the arbitrator could select any salary, as in hockey salary arbitration, he is likely to pick some compromise position which he determines is the actual market value of the player. In that case, it would be best strategically for management to decrease its offer and the player to increase his demand.” *Id.*

¹⁵² See Meth, *supra* note 9, at 388.

¹⁵³ *Id.*; See also Abrams, *supra* note 13, at 62.

¹⁵⁴ Meth, *supra* note 9, at 389.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*; see also Abrams, *supra* note 13, at 62.

¹⁶¹ Meth, *supra* note 9, at 390.

¹⁶² *Id.*

¹⁶³ See *id.* at 390-91; see also Abrams, *supra* note 13, at 62.

¹⁶⁴ Meth, *supra* note 9, at 391.

¹⁶⁵ See *id.* at 390.

¹⁶⁶ *Id.*

¹⁶⁷ See *id.* at 390-91; see also Abrams, *supra* note 13, at 62.

¹⁶⁸ Meth, *supra* note 9, at 391.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* Settlement is the purpose of FOA, thus the process is succeeding.

Major League Baseball's Answer to Salary Disputes and the Strike

¹⁷¹ See Chalpin, *supra* note 50, at 233-34 ("Salary arbitration in baseball has been cited as the number one reason baseball has 'so many overpaid millionaires' . . . the final-offer arbitration system currently in effect . . . has produced a system where the player, even if he loses, wins. Even when an arbitrator selects the team's offer, the player receives a significant raise."); see also Abrams, *supra* note 13, at 72 ("Baseball management has criticized salary arbitration since its inception for inflating player salaries").

¹⁷² John L. Fixel, *Play Ball! Baseball Arbitration After 20 Years*, 49 DISP. RESOL. J. 42, 47 (1994).

¹⁷³ See Chalpin, *supra* note 50, at 235 (noting that if the arbitrator was not bound to choose either one party's proposal or the other party's position, then the owners would not be in such a lose-lose situation).

¹⁷⁴ These disputes often concern the implementation of a salary cap, the removal of salary arbitration, the limitation of free agency, etc.

¹⁷⁵ See Chalpin, *supra* note 50, at 235 n.171.

¹⁷⁶ Note that the strike concerned the possible implementation of a salary cap, something falling without the scope of FOA, and the lockout concerned the Owner's dislike for salary arbitration in general. However, contests over actual salary disputes were not a reason for the strike or lockout as FOA suitably dealt with such disputes. *Id.*

¹⁷⁷ See Meth, *supra* note 9, at 407 ("This phenomenon teaches parties who have previously used arbitration to rely on it to resolve future impasses and to refrain from resolving disputes without it").

¹⁷⁸ *Id.* at 407-08.

¹⁷⁹ See *id.*

¹⁸⁰ See *id.*

¹⁸¹ Abrams, *supra* note 13, at 68.

¹⁸² *Id.*

¹⁸³ For example, player interest in better hotel accommodations, first class travel, flying out family members to see away games, etc. See Meth, *supra* note 9, at 410 ("The absence of non-economic factors that encourage settlement might also contribute to a lower settlement rate outside of the Baseball context").

¹⁸⁴ See Michael Novoseller, *The Role of Salary Arbitration in*

Major League Baseball at <http://futures.wharton.upenn.edu/-novose52/baseball.html> (last visited April 28, 2002) ("while salary arbitration contributes to spiraling baseball player salaries by consistently awarding players raises in salary, arbitration by itself is not responsible for increasing players' salaries").

¹⁸⁵ See *infra* Chart A; see also Abrams, *supra* note 13, at 64 (noting that players have only won 181 cases in salary arbitration. In addition, only in 1980, 1981, 1989, 1990 and 1996 did the players win more cases than the clubs).

¹⁸⁶ See Novoseller, *supra* note 184, at 6.

¹⁸⁷ See Conti, *supra* note 13, at 236.

¹⁸⁸ See *infra* Chart B; see also Abrams, *supra* note 13, at 72.

¹⁸⁹ See Abrams, *supra* note 13, at 72.

¹⁹⁰ See *infra* Section V for a discussion of the statistics surrounding final offer arbitration in MLB.

¹⁹¹ See Abrams, *supra* note 13, at 72.

¹⁹² See *id.*

¹⁹³ See *supra* notes 177-78 and accompanying text.

¹⁹⁴ See Meth, *supra* note 9, at 408. ("That those who use FOA declare impasses much more often than arbitrators implement awards demonstrates that FOA arbitrants use the process to facilitate negotiations").

¹⁹⁵ See *id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* ("Most cases settle between the date the arbitration is initiated and the date the arbitrator's decision is expected; only a small percentage are resolved by an arbitrator"); see also Melanie Aubut, *When Negotiations Fail: An Analysis of Salary Arbitration and Salary Cap Systems* 10 SPORTS LAW. J. 189, 224 (2003). "Regarding the salary arbitration procedure itself, its conventional design did not have a 'chilling or narcotic effect on salary negotiations.' In effect, in 1991, 77 of 100 players who filed for salary arbitration settled their cases prior to the hearing." In 1999, 12 out of 36 filings went to the hearing, while it was 13 out of 32 in 2000 and 17 out of 44 in 2001. This demonstrates that, even though parties use salary arbitration as a negotiation tool and even though some cases get very close to the hearing itself, most cases are settled without an arbitrator's involvement." *Id.*

¹⁹⁸ Meth, *supra* note 9, at 410.

¹⁹⁹ *Id.* at 410 (“the lure of multi-year, guaranteed contracts with bonuses and other perks is a strong incentive for many players and clubs to forego the salary arbitration hearing”); see *infra* Part III, Section B; see also *supra* notes 112-118.

²⁰⁰ See *supra* Part III, Section B; see also *supra* notes 101-109 and accompanying text.

²⁰¹ See Abrams, *supra* note 13, at 57, 61 (“Baseball’s salary arbitration is a process designed never to be used.... The final offer design of the arbitration process insures that the clubs and players will resolve most cases without the actual involvement of the arbitrators”).

²⁰² *Id.* at 57 (“Although it has not been totally successful in avoiding all hearings, salary arbitration has substantially achieved its primary goal of private settlement”).

²⁰³ See *id.*; see also Novoseller, *supra* note 184, at 4 (“in 1996, eighty-seven percent of players settled before arbitration, with only 10 of 76 players who filed for arbitration requiring their cases to be heard”); see also Conti, *supra* note 13, at 232 (“Since 1974, and up to and including 1996, 2008 players have filed for arbitration, yet 1608 (80%) settled before the dispute ever resulted in a hearing”).

²⁰⁴ See Abrams, *supra* note 13, at 57 (“If the parties cannot settle their differences privately, baseball’s salary arbitration provides a quick, informal, and, most importantly, a final resolution of the salary dispute.”).

²⁰⁵ See Novoseller, *supra* note 184, at app. A; see also Abrams, *supra* note 13, at 64.

²⁰⁶ See Conti, *supra* note 13, at 235 (“The reason behind the owners’ distaste for salary arbitration is their belief that the practice inflates the level of salaries so that the wages paid out to many players exceeds [sic] their true market value”).

²⁰⁷ See Chalpin, *supra* note 50, at 233-34 (“salary arbitration in baseball has been cited as the number one reason baseball has ‘so many overpaid millionaires’”); see also Novoseller, *supra* note 184, at 7 and text accompanying note; Conti, *supra* note 13, at 222 (“Owners of baseball teams have opposed the system of salary arbitration for over twenty years, citing the massive increases in salaries from such arbitration awards....”)

²⁰⁸ See Novoseller, *supra* note 184 (noting that free agency and television contracts also owe to the increase in player salaries); see also Conti, *supra* note 13, at 236 (discussing the paradigm shift in negotiating power from the owners to

the players and the end of the reserve clause. “Whenever there is a movement from such monopoly to a competitive labor market, there is bound to be salary escalation....”)

²⁰⁹ See Novoseller, *supra* note 184; see also *infra* Part III, Section D, for a discussion of other variables adding to salary inflation.

²¹⁰ See Conti, *supra* note 13, at 237 (“The club is not required to renew a player’s contract once a player decides to file for arbitration”).

²¹¹ *Id.* (“While the club has the option to participate in the process and thus retain the player for a one-year commitment, the club also has the option to non-tender, or refrain from offering a contract to that player.”)

²¹² *Id.*